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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 880

ROBERT F. ZEDDIES,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

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The Scheffer Press, Inc.—ANdover 3-6850

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Peitioner, Robert F. Zeddies, prays that this Court grant this petition for rehearing, vacate its order of June 15, 1959 which denied the petition for writ of certiorari, and grant the petition for writ of certiorari.

The grounds for this petition include intervening circumstances of substantial and controlling effect and other substantial grounds not previously presented and are as follows:

1. On June 15, 1959 the day the petition for writ of certiorari in this case was denied, this Court rendered its unanimous decision in *Napue* v. *People*, reversing a crim-

inal conviction on the ground that the knowing use by the prosecution of false testimony bearing on the credibility of a prosecution witness, which false testimony may have led to a finding of guilt, violates due process of law under the Fourteenth Amendment to the Constitution of the United States.

In this case the first question presented fairly contains the subsidiary question whether the knowing use of false records by the respondent Commissioner of Internal Revenue in making a deficiency determination demonstrates the invalidity of the determination, thereby requiring the Tax Court to make a redetermination from the evidence without regard to any presumption of correctness.

It was contended in the petition for certiorari that the Tax Court and Court of Appeals erred in not holding that the determination was invalid and, therefore, in failing to apply the salutary rule in *Helvering* v. *Taylor*, 293 U.S. 507, that the taxpayer's burden in the Tax Court is to establish the invalidity of the determination and upon carrying that burden he does not have the additional burden of proving that he owes no tax or the correct amount of tax due. The decision in the *Napue* case is but another aspect of the same problem and is relevant and applicable to this case.

When the Commissioner of Internal Revenue knowingly uses false records in making a deficiency determination he not only should lose the benefit of the presumption that his determination is correct, but he violates fundamental principles of fair play inherent in the due process clause of the Fifth Amendment. Where, as in this case, he rests his case on the presumption attaching to the invalid determination, and patently perjured testimony, fails to offer any evidence that the taxpayer had any unreported income, and

there is no affirmative evidence of such unreported income, due process as well as *Helvering* v. *Taylor*, require a decision for the taxpayer.

That the respondent knew that the determination was based on false records and contrary to fact and permitted the determination to go uncorrected is apparent. Thus the determination assumed that no over ceiling payments were made by the petitioner. (App. Vol. I, p. 40) Yet special agent Forman, who prepared Schedule 58K, (App. Vol. I, p. 173) which showed all petitioner's purchases at ceiling prices, knew that it was not uncommon and not unknown for over ceiling prices to be paid to candy manufacturers (App. Vol. I, p. 185); knew that the government witness Lavazzorio, one of the candy suppliers who was permitted to testify for respondent that he received no over ceiling payments from petitioner, (App. Vol. I, p. 152-153) had told Forman that petitioner had enabled his company to obtain materials. Forman also knew that petitioner had enabled Brach Candy Company to acquire candy at ceiling prices (App. Vol. I, p. 188).

It is apparent that the candy suppliers whose patently perjured testimony respondent vouched for and the Tax Court found unworthy of belief, denied receipt of over ceiling payments at the instance of respondent as well as out of self interest. Their records were still being retained by respondent at the time of the trial (App. Vol. I, p. 155).

Respondent did not show the basis for Schmeckebier transactions after petitioner established that Schmeckebier had used petitioner's blank invoices and forged them. Respondent did not produce Schmeckebier invoices when requested so to do by petitioner. If the determination was derived from records furnished by Schmeckebier respondent was under a duty to correct that determination.

The determination as to unreported commissions from Carol Lynn was based, we suggest, upon checks contained in Respondent's Exhibits S and T. Respondent assumed that those checks were commissions paid to petitioner, and unreported and not reimbursement of over ceiling payments as claimed by petitioner. When respondent's witness Brinkman identified checks in those exhibits as representing reimbursement of over ceiling payments as claimed by petitioner, the exhibits were not introduced in evidence (App. I, pp. 169-170). Yet, respondent, taking refuge in the presumption of correctness, permitted his determination to go uncorrected.

We do not think for a minute that this Court or the Solicitor General believes that this case was correctly decided below. The denial of the petition must have been based on doubt as to the national importance of the questions presented. In our opinion there is no matter of greater importance for this Court than to require that government deal fairly with its citizens.

2. A sharp conflict has arisen between the Seventh Circuit and Fourth Circuit on the question of the necessity of proof of unreported income as an element of fraud, the second question presented in the petition, as a result of the decision of the Fourth Circuit in *Richardson* v. *Commissioner of Internal Revenue*, 264 Fed. 2d 400, published May 4, 1959.

In *Richardson* the taxpayer did not deny that he had understated his gross receipts but defended against a deficiency determination on the ground of certain unreported expenses in the form of "kick-backs" which he had offset against unreported receipts. The Commissioner contended that the burden of proving such "kick-backs" rested on the taxpayer on the question of fraud.

Chief Judge Sobeloff's opinion states at page 405:

"We cannot agree that the findings of an understatement of gross receipts automatically puts on the taxpayers the obligation to prove the offsetting deductions in order to avoid a fraud penalty. Such a contention might have more force in a case where the unreported income and deductions were unrelated or only remotely related. There, the Tax Court might be justified in thinking that the newly asserted deductions were conceived belatedly in an effort to add to the Commissioner's burden. It might reasonably be contended in such a case that the taxpayer should have the burden even on the issue of fraud. We have no occasion to decide this, however, for here the unreported income and the unclaimed deductions are intertwined. We think the failure to report these two items is not a sufficient ground to distinguish the instant case from *Valetti* [*Valetti* v. *Commissioner of Internal Revenue*, Third Circuit, 260 Fed. 2d 185 at 188] and thus to lessen the burden on the Commissioner. *In order for a fraud penalty to be assessed where the unreported items of income and expense are closely related, the Commissioner must prove that at least some unreported net income resulted from the unrecorded transactions.* [Emphasis supplied] This principle was applied in the Tax Court in *H. J. Feinberg & Co., Inc.*, 9 T. C. M. 776 (1950).

* * * We conclude that while the taxpayers have failed to carry their burden in attacking the deficiency assessment, the Commissioner has not met the burden resting upon him to prove such deficiency resulted from fraud."

In the instant case petitioner, as in *Richardson*, stipulated as to unreported receipts but claimed and proved that these were offset by the cost of the goods sold which included over ceiling payments. The respondent Commissioner of Internal Revenue did not prove affirmatively and

could not prove that there was a deficiency. The Tax Court believed petitioner's evidence as to his employment by Kroger Grocery Company but refused to allow him all of his claims for lack of "documentation", but not for lack of uncontroverted sworn testimony. (App. Vol. I, p. 246) The deficiency determination was thus sustained with adjustments. The deficiency was considered by the Tax Court as one of the elements of fraud. The *Richardson* case, and the instant case, cannot be reconciled on the issue of proof of fraud.

3. An article entitled "The Expanding Concept of Tax Fraud" in American Bar Association Journal, Vol. 45, No. 6, p. 577, June 1959, brings into focus the national importance of the questions presented.

At page 578 of the article is the following:

> "Though the Commissioner's determination of a deficiency, and therefore of the presence of taxable or 'hidden' income is presumptively correct, his determination of fraud or criminality is *not* presumptively correct. The Tax Court, however, tends to follow the Commissioner even in his determinations of fraud or criminality. The courts follow the Tax Court in its determination of fact.
>
> This may appear as a catalogue of unrelated rules. Yet these are blocks out of which it seems we have built a top-heavy legal structure. Several recent cases, added to the many cases moving in this direction, must give us pause."

The extreme has been reached in this case where there is no affirmative evidence of a deficiency. Yet fraud is held to be clear and convincing from petitioner's failure to report a presumed deficiency the invalidity of which is clear, and tax years long barred by the statute of limitations are opened.

4. This Court has unlimited discretion with respect to its certiorari jurisdiction. It can never be said that it has ever abused such discretion. By providing by rule for the filing of a petition for rehearing in cases where the petition for writ of certiorari is denied the Court necessarily recognizes that there are some petitions for certiorari which deserve a second look. It has granted petitions for rehearing in cases such as this before. We respectfully suggest that this is such a case. We wrote the Solicitor General on June 18, 1959, asking him to join in this petition for rehearing.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN J. YOWELL,
G. KENT YOWELL,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of the rules of this Court. The respondent cannot be delayed by consideration of this petition as petitioner did not file a supersedeas bond in the Tax Court as required by T 26USCA § 7485 and nothing other than uncollectability has prevented enforcement of assessment dated August 22, 1958 based upon the decision of the Tax Court.

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Counsel for Petitioner